

FEDERAL COMMUNICATIONS COMMISSION

Washington, D. C. 20554

FEB 11 2016

OFFICE OF
MANAGING DIRECTOR

Lawrence Rogow, Manager
Bellagio Broadcasting, LLC
5670 Wilshire Boulevard, Suite 1300
Los Angeles, CA 90036

Licensee/Applicant: **Bellagio Broadcasting, LLC**
Waiver and Refund of Regulatory Fees
Disposition: **Dismissed and Denied** (47 U.S.C. §
159(c)(2); 47 C.F.R. §§ 0.401, 1.3, 1.7, 1.1160, and
1.1166)
Station: KVME-TV, Facility ID 83825
Fee: Fiscal Year (FY) 2013 Regulatory Fees
Date Request Submitted: Mar. 5, 2014
Date Regulatory Fees Paid: Sep. 18, 2013
Fee Control No.: RROG-14-00015572

Dear Mr. Rogow:

This responds to Licensee's *Request*¹ for a partial refund of its 2013 regulatory fees paid for station KVME, Bishop, California, because the "Grade B contour service area only reaches 0.15% of the population and television households of the Los Angeles DMA," hence Licensee should pay a reduced fee comparable to a smaller DMA market. Because Licensee's submission fails to comply with the Commission's filing procedures, we dismiss, and, in the alternative, because Licensee fails to demonstrate that the fee paid is excessive or that it should be waived or reduced, we deny the *Request*.

¹Letter from Lawrence Rogow, Manager, Bellagio Broadcasting, LLC, 5670 Wilshire Blvd, Suite 1300, Los Angeles, CA 90036 to Office of the Managing Director, FCC, 455 12th St., S.W., Rm 1-A625, Washington, DC 20554 (Attn: Regulatory Fee Waiver/Reduction Request) (Mar. 5, 2014) (*Request*) with Attachment A (Fee Filer)(9/18/2013), Attachment B (CA Bishop KBBC Coverage Map), Attachment C (Los Angeles, CA Demographic and Economic Summary 2011 Television Market-By-Market Review), Attachment D (North Platte, NE, Demographic and Economic Summary), Attachment E (2013 Regulatory Fee Information Site). We note that the text of Licensee's *Request* (p. 1) states that it "requests a partial refund of its 2012 regulatory fee." We construe this to be an inadvertent typographical error, and that Licensee intended to refer to the year, 2013. Licensee's submission to the Office of the Managing Director, Room 1-A625, does not comply with the Commission's rule requiring filing with the Commission's Secretary (47 C.F.R. § 1.1166(a)(2)).

Background

On March 5, 2014, Licensee submitted to the Commission's Office of the Managing Director its *Request* asserting, in relevant part, that it "is licensed to the city of Bishop in Inyo County, California, which is part of the Los Angeles DMA and therefore is required to pay a regulatory fee of \$38,000 ... [h]owever, as illustrated in [Licensee's attached] Grade B contour map ... KVME's service area has a population of 26,140 which makes up slightly more than the entire Inyo County population. Although KVME is serving as part of the Los Angeles DMA ... KVME's Grade B contour service area reaches only 0.15% of the population and television households of the Los Angeles DMA [Licensee] believes that circumstances dictate that [its] regulatory fee be adjusted in accordance with the Implementation of Section 9 of the Communications Act, Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year, [*Memorandum Opinion and Order*,] 10 FCC Rcd 12759 (1995) [(1994 MO&O)], paras. 21-22, and hereby requests a refund of \$34,325 ... the difference between the regulatory fee ... paid ... and the amount charged to UHF television stations in market outside of rank 100 (\$3,675)."²

Standards

The Commission's rules set forth our well established procedures for assessing and collecting annual regulatory fees, the consequences for failing to make timely complete payment, the procedures for submitting petitions to defer payment and to petition for waivers, reductions, and refunds, and procedures for filing.³ Licensees are expected to know these rules and procedures⁴ as well as the consequences for non-compliance.

The 1994 MO&O, relied on by Licensee, discusses then-relevant circumstances upon which a licensee may apply for a reduction of its regulatory fee. Specifically, the Commission explains, a licensee of a UHF station, lacking network affiliation, operating in a large market, not providing a signal to a substantial portion of DMA, and not carried by cable systems serving the DMA principal metropolitan areas, may apply to the Managing Director for a reduction of the fee. Thereafter, the Managing Director, under delegated authority, will determine if the station with these characteristics demonstrates it should be charged a fee "based on the number of television households served, and it will be charged the same fee as stations serving markets with the same number of television households" using information derived from "the Arbitron [now A.C. Nielsen] market data in the [Nielsen Station Index Directory and Nielsen Station Index US Television Household Estimates or any successor publications]."⁵

² *Request* at 1-2.

³ 47 C.F.R. § 1.1166; see 47 C.F.R. Part 1, Subpart G.

⁴ 47 C.F.R. § 0.406; see *Life on the Way Communications, Inc., Forfeiture Order* 30 FCC Rcd 2603, 2607 (2015).

⁵ Implementation of Section 9 of the Communications Act, Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year, *Memorandum Opinion and Order*, 10 FCC Rcd 12759, 12763, ¶¶ 21-22 (1995) (1994 MO&O); Assessment and Collection of Regulatory Fees for Fiscal Year 1996, *Report and Order*, 11 FCC Rcd 18774, 18786, ¶ 32 (1996) ("We ... rely on Nielsen's DMA market rankings ... Nielsen data is generally accepted throughout the industry and will be updated and published annually ... We will consider the equities concerning the fees of licensees that change markets on a case-by-case basis, upon request, and, where a licensee demonstrates that it does not serve its assigned market, we will consider reducing the assigned fees to a more equitable level, based upon the area actually served by the licensee.").

Relevant to annual regulatory fees, section 614(h)(1)(C) of the Communications Act, as amended by the Telecommunications Act of 1996, codified at 47 U.S.C. § 534, provides that a station's market shall be determined by the Commission by regulation or order using, where available, commercial publications which delineate television markets based on viewing patterns. See 47 U.S.C. § 534(h)(1)(C). Section 76.55(e)(2) of the Commission's rules specifies that a commercial broadcast television station's market is its Designated Market Area (DMA) as determined by Nielsen Media Research and published in its Nielsen Station Index Directory and Nielsen Station Index US Television Household Estimates or any successor publications.⁶

The Commission's rule at 47 C.F.R. § 1.1160(a) provides that a refund of regulatory fees will be made upon request, only in the following instances:

- (1) When no regulatory fee is required or an excessive fee has been paid. In the case of an overpayment, the refund amount will be based on the applicants', permittees', or licensees' entire submission. * * *
- (2) * * *
- (3) When a waiver is granted in accordance with § 1.1166.
* * *
- (d) No refunds will be processed without a written request from the applicant, permittee, licensee or agent.

Under 47 C.F.R. § 1.1166,

The fees ... may be waived, reduced or deferred in specific instances, on a case-by-case basis, where good cause is shown and where waiver, reduction or deferral of the fee would promote the public interest. ... (a) ... All such filings within the scope of the fee rules shall be filed as a separate pleading and clearly marked to the attention of the Managing Director. Any such request that is not filed as a separate pleading will not be considered by the Commission. ... (2) If no fee payment is submitted, the request should be filed with the Commission's Secretary.

The crux of a request to refund a regulatory fee at § 1.1160 is demonstrating either that an excessive fee has been paid or that the fee should be waived or reduced. As to the latter, in certain instances, payment of a regulatory fee may be waived, reduced, or deferred upon a showing of *good cause*⁷ and a finding that the *public interest will be served thereby*.⁸ The

⁶ 47 C.F.R. § 76.55(e)(2); Assessment and Collection of Regulatory Fees for Fiscal Year 2000, *Report and Order*, 15 FCC Rcd 14478, 14492, ¶ 34 (2000) ("Fees for television stations are based on market size as determined by Nielsen. This is the only consistent source the Commission has for determining which market a station serves.").

⁷ 47 C.F.R. § 1.3.

⁸ 47 U.S.C. § 159(d); 47 C.F.R. § 1.1166 ("The fees ... may be waived, reduced or deferred in specific instances, on a case-by-case basis, where good cause is shown and where waiver, reduction or deferral of the fee would promote the public interest."). See also Implementation of Section 9 of the Communications Act, Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year, *Report and Order*, 9 FCC Rcd 5333, 5354, ¶ 65 (1994) (1994 *Report and Order*); *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*).

applicant has the burden of demonstrating relief is warranted,⁹ *i.e.*, that special circumstances warrant a deviation from the general rule to collect the regulatory fee, and that the deviation will serve the public interest.¹⁰

To initiate and complete the filing of such a request, an applicant must follow the Commission's procedures at 47 C.F.R. §§ 0.401, 1.7, and 1.1166 that establish the proper location for filing waiver, reduction, and refund requests and the consequence of dismissal for failing to comply with those rules.¹¹ The Commission has designated specific offices to receive and process certain matters, thus a request for relief is filed only upon receipt at the location designated by the Commission.¹² As such, under 47 C.F.R. § 1.1166,¹³ a petition to waive or reduce a regulatory fee must be filed with the Secretary, Federal Communications Commission, Attention: Managing Director, Washington, D.C. 20554 by mailing or otherwise delivering a hard copy of the documents to Office of the Secretary.

Discussion

As we discuss below, we dismiss the *Request* because Licensee's submission requesting a reduction or waiver of the fee fails to comply with the Commission's filing procedures, and, in the alternative, we deny the *Request* because Licensee fails to demonstrate it paid an excessive fee or that its situation warrants a waiver of the fee and a refund.

First, we dismiss the *Request* because Licensee's submission does not comply with Commission's procedures for filing. For example, 47 C.F.R. §§ 0.401, 1.7, and 1.1166 establish the proper location for filing waiver and refund requests and the consequence of dismissal for failing to comply with those rules. The Commission has designated specific offices to receive and process certain matters, thus a request for relief is *filed* only upon receipt at the location designated by the Commission.¹⁴ Under 47 C.F.R. §§ 1.1160 and 1.1166,¹⁵ Licensee's request to reduce and refund the fee paid or to waive a portion of the regulatory fee must be *filed* with the Secretary, Federal Communications Commission, Attention: Managing Director, Washington, D.C. 20554 by mailing or otherwise delivering a hard copy of the documents to Office of the Secretary. Licensee's submission addressed to the Office of the Managing Director at Room 1-A625 was not delivered to the Commission's Office of the Secretary, hence the *Request* was never filed and it may be dismissed and returned unprocessed.¹⁶ Even so, as a matter of

⁹ *Tucson Radio, Inc. v. FCC*, 452 F.2d 1380, 1382 (D.C. Cir. 1971).

¹⁰ *Northeast Cellular*, 897 F.2d at 1166.

¹¹ 47 C.F.R. § 0.401 ("The Commission maintains several offices and receipt locations. Applications and other filings not submitted in accordance with the addresses or locations set forth below will be returned to the applicant without processing. When an application or other filing does not involve the payment of a fee, the appropriate filing address or location is established elsewhere in the rules for the various types of submissions made to the Commission."), 1.7 ("pleadings and other documents are considered to be filed with the Commission upon their receipt at the location designated by the Commission").

¹² *Id.*

¹³ 47 C.F.R. § 1.1166(a)(2) ("If no fee payment is submitted, the request [for waiver and deferral] should be filed with the Commission's Secretary.").

¹⁴ 47 C.F.R. § 1.7 ("pleadings and other documents are considered to be filed with the Commission upon their receipt at the location designated by the Commission.").

¹⁵ 47 C.F.R. § 1.1166(a)(2).

¹⁶ 47 C.F.R. § 0.401.

administrative economy, we look to merits of Licensee's *Request*, and, as we discuss next, in the alternative, deny.

Licensee fails to establish it paid an excessive fee.¹⁷ Licensee's fee for a commercial television station is based upon the size of the Nielsen DMA,¹⁸ the fact and procedure for which Licensee neither disputes nor challenges as being erroneous. Rather, the essence of Licensee's *Request* is that a waiver of the determined fee amount is appropriate because the station's Grade B contour shows an area the population of which is smaller than the population of the designated DMA. In particular, Licensee asserts the Grade B contour shows it reaches only a small percentage of the DMA market, and that these circumstances warrant reduction of the regulatory fee based on the Commission's discussion in paragraphs 21 and 22 of 1994 *MO&O*. Licensee's reliance on the 1994 *MO&O* is misplaced.

Licensee fails to demonstrate that the circumstances described as the grounds for relief in 1994 *MO&O* are valid now, that the characteristics enumerated in the 1994 *MO&O* apply to Licensee, and that Licensee's payment is excessive.

First, the market conditions in the 1994 *MO&O* that are the basis for a reduction of the fee are enumerated and serve as necessary characteristics. At the time, applicants considered for relief "were generally UHF stations ... lack[ing] network affiliations ... located outside of the principle city's metropolitan area and do not provide a Grade B signal to a substantial portion of the market's metropolitan areas. Often these stations are not carried by cable systems serving the principal metropolitan areas."¹⁹ To show whether a station "serve[s] the principal metropolitan areas within their assigned markets and serve[s]" a particular number of "television households ... [the applicant should present information] derived from the Arbitron market data in the Television and Cable Fact Book."²⁰

Over time, however, the circumstances existing in 1995 changed, so that an applicant for relief now must consider and address those relevant changes or invite denial of the relief. For example, major changes in 1996, 2000, and 2009 effectively dispose of Licensee's *Request*.

First, the Commission does not rely on Arbitron market data. In 1996, Arbitron market data was replaced by A.C. Nielsen ratings to determine which market a station serves,²¹ and

¹⁷ Consistent with 47 C.F.R. § 1.1160(a)(1), we considered Licensee's entire submission.

¹⁸ 47 U.S.C. § 534(h)(1)(C); 47 C.F.R. § 76.55(e)(2); Assessment and Collection of Regulatory Fees for Fiscal Year 2000, *Report and Order*, 15 FCC Rcd 14478, 14492, ¶ 34 (2000); see FY 2001 Mass Media Regulatory Fees, *Public Notice* (Aug. 7, 2001); FY 2002 Media Services Regulatory Fees, *Public Notice* (Aug. 7, 2002), What You Owe-Media Services Licensees For FY 2013, *Regulatory Fees Fact Sheet* (Sep. 5, 2013).

¹⁹ 1994 *MO&O*, 10 FCC Rcd at 12763, ¶ 21.

²⁰ *Id.* at 12763, ¶ 22.

²¹ Assessment and Collection of Regulatory Fees for Fiscal Year 1996, *Report and Order*, 11 FCC Rcd 18774, 18786, ¶ 32 (1996) ("We ... rely on Nielsen's DMA market rankings ... Nielsen data is generally accepted throughout the industry and will be updated and published annually ... We will consider the equities concerning the fees of licensees that change markets on a case-by-case basis, upon request, and, where a licensee demonstrates that it does not serve its assigned market, we will consider reducing the assigned fees to a more equitable level, based upon the area actually served by the licensee."); Assessment and Collection of Regulatory Fees for Fiscal Year 2000, *Report and Order*, 15 FCC Rcd 14478, 14492, ¶ 34 (2000) (Commission rejected commenter's "argu[ment]" that small television stations located near large designated market areas (DMA) are assessed disproportionately high

thereafter “[f]ees for television stations are based on market size as determined by Nielsen.”²² As to fee determinations, in 1996, the Commission said it would consider cases in which an applicant demonstrated it does not serve its assigned market, however, in 2000, the Commission noted that it “is unaware of the existence of any reliable published source that can identify which television stations are serving small markets at the fringe of larger DMA’s.”²³ Licensee must shoulder the heavy burden establishing that its circumstances fall within these defined limits and the Nielsen ratings are wrong. The Nielsen rating standard is codified at 47 C.F.R. § 76.55(e)(2), which provides, “[e]ffective January 1, 2000, a commercial broadcast television station’s market, unless amended pursuant to § 76.59, shall be defined as its Designated Market Area (DMA) as determined by Nielsen Media Research and published in its Nielsen Station Index Directory and Nielsen Station Index US Television Household Estimates or any successor publications.” Annual regulatory fees assessed on commercial television stations licensees are based upon the size of the Nielsen DMA.

Next, the Grade B contour information referenced in the 1994 *MO&O*, and relied on by Licensee as authority for a refund, is not relevant to show a station’s digital station strength. Grade B contour defines an *analog* television station’s service area, *see* 47 C.F.R. § 73.683(a), and with the completion of the full power digital television transition on June 12, 2009, there are *no longer any full power analog stations*. Indeed, Licensee’s station is digital. As such, and as set forth in Section 73.622(e), a station’s digital (DTV) service area is defined as the area within its noise-limited contour where its signal strength is predicted to exceed the noise-limited service level. *See* 47 C.F.R. § 73.622(e). Accordingly, the Commission has treated a digital station’s noise limited service contour as the functional equivalent of an analog station’s Grade B contour.²⁴ Even so, in its *Request*, Licensee fails to include that information or to discuss how it demonstrates the fee determination results in an excessive fee payment.

Next, Licensee fails to establish that its circumstances match those described in the 1994 *MO&O*. Indeed, they do not. Differing from the characteristics described in 1994 *MO&O*,²⁵ Licensee’s station is digital, it is affiliated with the Me-TV²⁶ network, it is carried by cable and satellite providers,²⁷ its fee is based on the market size determined by the Nielsen ratings, and the Grade B contour information is not relevant. Indeed, except for Licensee’s reference to the

fees because the A.C. Nielsen ratings include them in the DMA but they do not serve households in the DMA. Fees for television stations are based on market size as determined by Nielsen. This is the only consistent source the Commission has for determining which market a station serves.”).

²² Assessment and Collection of Regulatory Fees for Fiscal Year 2000, *Report and Order*, 15 FCC Rcd at 14492, ¶ 34, *supra*.

²³ *Id.* at 14493.

²⁴ Report to Congress: The Satellite Home Viewer Extension and Reauthorization Act of 2004, Study of Digital Television Field Strength Standards and Testing Procedures, 20 FCC Rcd 19504, 19507, ¶ 3 (2005) (The Grade B signal intensity standard, as set forth in Section 73.683(a) of the Commission’s rules, is used to identify a geographic contour that defines an analog television station’s service area. For digital television stations, the counterpart to the Grade B signal intensity standards for analog television stations are the values set forth in Section 73.622(e) of the Commission’s Rules describing the DTV noise-limited service contour.); Petition for Modification of Dayton, OH Designated Market Area With Regard to Television Station WHIO-TV, Dayton, OH, *Memorandum Opinion and Order*, 28 FCC Rcd 16011, 16013, fn 15 (MB 2013).

²⁵ 1994 *MO&O*, 10 FCC Rcd 12763, ¶ 21.

²⁶ *See* <http://www.broadcastingcable.com/news/local-tv/nab-weigel-adds-kvme-me-tvs-distro-list/43426>.

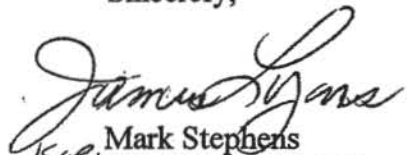
²⁷ *See* fn 28, below.

irrelevant Grade B contour information, Licensee fails to acknowledge or match the characteristics in 1994 MO&O to its operation. Moreover, Licensee fails to show that the fee determined from Nielsen ratings is incorrect. Licensee asserts it is serving a much smaller market area; however, it fails to include supporting relevant and specific Nielsen market data. On this point, other information contradicts the core of Licensee's claim. For example, public information shows Licensee's station is carried on DirecTV, Dish Network, and FiOS, and that affiliation with Me-TV in Southern California "add[s] more than two million homes to [Me-TV's] footprint in Southern California."²⁸ The whole of Licensee's *Request* fails to demonstrate the fee paid is excessive.

Finally, even if we construe Licensee's *Request* as seeking a waiver under 47 C.F.R. §1.1166, Licensee fails to establish for a waiver both *good cause*²⁹ and a finding that the *public interest will be served thereby*.³⁰ Accordingly, the *Request* is denied.

If you have any questions concerning this matter, please contact the Revenue & Receivables Operations Group at (202) 418-1995.

Sincerely,


Mark Stephens
for: Chief Financial Officer

²⁸ <http://www.tvnewscheck.com/article/58797/metv-adds-kvme-in-southern-california?nocookies>

In addition to over-the-air reception, Me-TV will be carried on DirecTV and Dish Network ch. 20, as well as FiOS ch. 462. Me-TV said these changes add more than two million homes to its footprint in Southern California. Me-TV Network clearances cover more than 78% of the country, serving 121 affiliates. "We are excited to bring our KVME facility into the Me-TV family and provide local advertisers with a significant opportunity to reach classic TV fans in the region where most of the Me-TV programming was originally created," stated Paul Koplin, president-CEO of Venture Technologies, licensee of KVME.

<http://www.broadcastingcable.com/news/local-tv/nab-weigel-adds-kvme-me-tvs-distro-list/43426> ("KVME joins independent KDOC Los Angeles in South California. Both stations will brand themselves Me-TV Hollywood. Me-TV also can be found on Dish Network and DirecTV in Southern California as well as on FiOS").

²⁹ 47 C.F.R. § 1.3.

³⁰ 47 U.S.C. § 159(d); 47 C.F.R. § 1.1166. See also 1994 Report and Order, 9 FCC Rcd at 5354, ¶ 65; *WAIT Radio v. FCC*, 418 F.2d at 1159; *Northeast Cellular*, 897 F.2d at 1166.